

***United States Court of Appeals
for the Second Circuit***



**APPELLANT'S
REPLY BRIEF**

NO. 77-6075

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

NATIONAL LABOR RELATIONS BOARD,

Plaintiff-Appellant,

v.

COMMITTEE OF INTERNS AND RESIDENTS, AND
NEW YORK STATE LABOR RELATIONS BOARD,

Defendants-Appellees.

ON APPEAL FROM AN ORDER OF THE
UNITED STATES DISTRICT COURT FOR
THE SOUTHERN DISTRICT OF NEW YORK

REPLY BRIEF FOR PLAINTIFF-APPELLANT
NATIONAL LABOR RELATIONS BOARD

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ARGUMENT

1. Defendant-appellee CIR attacks at great length (Br. 58-71) the national labor policy articulated by the NLRB with respect to house-staff officers. We submit, however, that the propriety of the NLRB's policy determination is not at issue in this case. The threshold issue here is whether the NLRB had jurisdiction to make that policy determination. The answer to that is clear: Congress, via the 1974 health care amendments, gave the NLRB exclusive jurisdiction over the labor relations of private health care institutions. The second issue, then, is whether the NLRB has relinquished its jurisdiction over housestaff officers. The answer again is

clear: The NLRB has not given up its jurisdiction, but rather has exercised its jurisdiction to determine that national labor policy would not be served by extending bargaining rights to housestaff. The states simply do not have authority to make a contrary determination.

2. In any event, the CIR virtually admits the reasonableness of the NLRB's policy when it states (Br. 71):

Cedars-Sinai as ultimately inflated by St. Clare's may, indeed, signify the NLRB sense of its limitations in separating out in hospital/house staff relations the economics which are bargainable from the education which is not bargainable under the NLRA.

For the NLRB itself stated in St. Clare's that an examination of the facts before it led it to conclude that "the confluence of [housestaff officers'] institutional responsibilities and academic development preclude the regulation of this relationship through collective bargaining." 229 NLRB No. 158 at 14. The NLRB explained why it views collective bargaining as not adaptable to academic relationships such as the relationship which exists between hospital and housestaff:

The educational process—particularly at the graduate and professional levels—is an intensely personal one. It is personal not only for the student being educated, but also for the instructors whose responsibility it is to educate a large number of individuals possessing a variety of educational backgrounds and abilities. Collective bargaining on the other hand is, as its very name implies, predicated upon "collective" treatment for all who are represented, and thus in many respects may be said to represent the very antithesis of personal individualized education.

In addition to being "collective," the bargaining process is also designed to promote equality of bargaining power, another concept largely foreign to higher education. While participatory education is on the rise, the student-teacher relationship is an inherently inequalitarian one, it being assumed that the teacher, by virtue of superior knowledge and experience, is in a better position to determine the most appropriate course of

instruction and method of proceeding. In this respect, the teacher and student having a mutual interest in the advancement of the student's education. Such mutuality of goals rarely exist in the typical employment relationship, and goes far towards explaining why collective bargaining can flourish in one sphere while constituting an anathema in the other. [Id. at 9-10 (footnote omitted).]

The NLRB went on to show how collective bargaining could have a deleterious effect on some specific aspects of the relationship between housestaff and hospital, such as work hours and program advancement:

The subject of hours, for example, is of particular relevance when speaking of housestaff. Residents and interns work notoriously long hours. From a strictly educational standpoint, such hours may be necessary in order to provide the students with as broad an experience as possible. Also, it may be educationally desirable for a particular student not only to prepare the diagnosis of a patient, but to administer the treatment as well. Unfortunately, medical emergencies do not always conveniently occur between the hours of 9 a.m. and 5 p.m., Monday through Friday. Thus, the flexibility which medical educators need to schedule shifts, assignments, transfers, etc., in an educationally sound fashion could become bargainable should the housestaff be afforded collective-bargaining privileges.

Program advancement is another subject of academic concern which could be affected by the advent of bargaining. Continuation in many graduate programs is dependent not only upon an assessment of a student's educational progress to date, but upon future potential as well. All such assessments are necessarily subjective and—particularly with respect to future potential—are not readily quantifiable. Were students deemed to be employees, the failure to recommend program continuation would be tantamount to discharge and thus a mandatory subject of bargaining. In all likelihood, a student protest over an unfavorable recommendation would end up before an arbitrator, with the arbitrator being asked to decide whether the subjective recommendation was academically justified—an issue not generally within the scope of most arbitrators' expertise.

In addition to those matters mentioned above, other academic prerogatives such as examinations, grading, course content and materials, program duration, and teaching methods are likely to find their way eventually to the bargaining table. To the extent that this phenomenon limits the ability of students and faculty to tailor the instruction to their own individualized needs, the quality of the educational process is impeded thereby working not only to the detriment of the hospital and students, but ultimately to the detriment of the public as well. We simply do not view such intrusions into traditional academic freedoms as being in the public interest. [Id. at 11-12.]

All these factors fully support the NLRB's conclusion that "when an individual is providing services at the educational institution ... as part and parcel of his or her educational development the individual's interest in rendering such services is more academic than economic," and that in view of the nature of the relationship "extending bargaining privileges to [housestaff] would not be in the best interest of national labor policy." Id. at 12-13.

Thus, as the CIR has recognized, there is a genuine problem "in separating out in hospital/house staff relations the economics which are bargainable from the education which is not bargainable under the NLRA." The NLRB's conclusion that housestaff officers, as a matter of national labor policy, should not be accorded the collective bargaining rights of employees, is a reasonable approach to that problem. ^{1/}

^{1/} Prior to the consideration of this matter by the courts of the state of New York, the Pennsylvania Supreme Court reviewed the soundness of the NLRB's approach to housestaff labor relations and adopted that approach for state-run health care institutions. The Pennsylvania Supreme Court also held that the NLRB's Cedars-Sinai decision was binding on the state at private health care institutions because the state was preempted from taking action contrary to the NLRB's determination at those institutions. Philadelphia Association of Interns and Residents v. Albert Einstein Medical Center, Pa. , 92 LRRM 3410 (1976).

3. Defendant-appellee CIR mistakenly relies (Br. 38-39) on the fact that courts have allowed states to assert jurisdiction over agricultural workers, excluded by Congress from the statutory definition of "employee," as support for the notion that states may also assert jurisdiction over housestaff officers, determined by the NLRB not to be "employees." The essential distinction between the treatment of the two groups is that Congress did not predicate its exclusion of agricultural workers upon a national policy determination that they should be denied collective bargaining rights. Rather, the legislative history of the Wagner Act suggests that agricultural workers were excluded because of a Congressional concern that including them would be unconstitutional under the United States Supreme Court decision invalidating the National Industrial Recovery Act,^{2/} because they were not employed in "interstate commerce" as then defined by the Supreme Court. See 79 Cong. Rec. 9721 (House, June 19, 1935) (reprinted in the appendix hereto).^{3/}

The CIR further notes (Br. 38) that the Alabama Supreme Court has allowed independent contractors, who have also been excluded from the statutory definition of "employee," to be subject to state labor law jurisdiction. This single judicial conclusion is questionable. The legislative history of the Taft-Hartley Act, which added the exclusion, shows that Congress was reversing a decision of the United States Supreme Court which had accorded

^{2/} Schechter Poultry Corp. v. United States, 295 U.S. 495 (1935).

^{3/} See also S. Rep. No. 1184, 73d Cong. 2d Sess. 3 (1934) (reprinted in the appendix hereto) for a pre-Schechter but similar expression of concern in the Senate that disputes involving agricultural workers would not be of a sufficient magnitude and would not affect commerce.

collective bargaining rights to groups deemed by the Congress to be independent contractors. ^{4/} See 93 Cong. Rec. 6599 (Senate, June 5, 1947) (reprinted in the appendix hereto). Whether Congress intended to cede to the states the power to do what it found to be improper ^{5/} when done by the United States Supreme Court, has never been determined by a federal court.

Neither of these statutory exclusions contradicts the principle that when the formulators of national labor policy determine, as a matter of policy, that certain classifications of individuals ought not to be granted collective bargaining rights, the states are not free to step in and extend bargaining rights in any form to these individuals. See Bethlehem Steel Co. v. New York State Labor Relations Board, 330 U.S. 767 (1946), discussed in our main brief at pages 18-19.

^{4/} N.L.R.B. v. Hearst Publications, Inc., 322 U.S. 111 (1944).

^{5/} See H. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947) (reprinted in the appendix hereto).

CONCLUSION

For the foregoing reasons, as well as those stated in the Board's opening brief, we submit that the District Court's order is erroneous and should be reversed.

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APPENDIX

79 Cong. Rec. 9721 (House, June 19, 1935)

DEBATES IN HOUSE ON S. 1958

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the organization of share-croppers or tenant farmers or other types of agricultural labor, but in the vast sections of the Middle West, especially in those States where the farms are smaller and more or less of a family affair, where only the family is employed on the farm except with occasional employment of others, it would be very unfortunate to permit the organization of casual farm employees. In some States of the Union, especially in the Middle West, the farmers seldom employ more than one or two employees, and then for only seasonal employment. I do not believe that it is advisable to bring them within the scope of the bill.

Mr. MARCANTONIO. We passed the triple A bill here, and you have not done a single thing for the agricultural worker.

Mr. BOILEAU. The agricultural worker is not a problem in some of the States. In some of the States they have practically no employees in the generally accepted sense of the term.

Mr. KNUTSON. Mr. Chairman, I rise in opposition to the amendment to ask the gentleman from Massachusetts a question. The gentleman stated a moment ago that he believed in taking one bite at a time, carrying the inference that ultimately under this legislation it is proposed to organize agricultural laborers.

Mr. CONNERY. I did not say just exactly that. If the gentleman asks me personally how I feel about the organization of agricultural workers, I certainly hope they will organize just the same as industrial workers.

After thorough consideration, our committee decided, at this time, not to include agricultural workers.

Mr. KNUTSON. For the time being? That is all I wanted to know.

Mr. ELLENBOGEN. Mr. Chairman, I move to strike out the last three words.

Mr. CONNERY. Mr. Chairman, I ask unanimous consent that all debate on this section and all amendments thereto close in 5 minutes.

The CHAIRMAN. Without objection, it is so ordered.

There was no objection.

Mr. ELLENBOGEN. Mr. Chairman, I take this time to ask the gentlemen from New York [Mr. MARCANTONIO] a question. Does the gentleman from New York believe that agricultural workers would come within the definition of the Supreme Court of "interstate commerce," so that they could come within the purview of this act?

Mr. MARCANTONIO. I think that the agricultural workers should be included to the same extent that the industrial workers are included.

Mr. ELLENBOGEN. I think so, too, but, under the N. R. A. decision of the Supreme Court, they could not be included in this bill, unless they came within the term "interstate commerce." The gentleman knows that.

Mr. LORD. Will the gentleman yield?

Mr. ELLENBOGEN. I yield.

Mr. LORD. Does not the gentleman think that the agricultural worker is entitled to a 30-hour week just the same as the man who works in the shoe factory?

Mr. ELLENBOGEN. I personally believe that the agricultural workers should have all the protection we can give them, but the point which bothers me is the question whether the Congress has juris-

79 Cong. Rec. 9721 (House, June 19, 1935)

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diction over them unless they come within the meaning of the term "interstate commerce." If we have the power to do it, we should include the agricultural workers.

I yield back the balance of my time, Mr. Chairman.

The CHAIRMAN. The question is on the amendment offered by the gentleman from New York [Mr. MARGANTONIO].

The amendment was rejected.

Mr. RICH. Mr. Chairman, I offer an amendment which is at the Clerk's desk.

The Clerk read as follows:

Amendment offered by Mr. RICH: On page 6, line 9, at the end of the last paragraph, insert the following:

"The term 'labor organization' shall not include any organization defined in the preceding paragraph unless said organization files with the National Labor Relations Board its acceptance of the following conditions of operation:

"(a) That all elections and votes on strikes shall be by secret ballot.

"(b) That a reliable accounting system will be maintained, and will be audited at least annually, with reports promptly and duly made to a meeting of the members, and a copy filed with the National Labor Relations Board.

"(c) That its membership books, or rolls, will not be closed to new members and all applicants will be admitted to membership, except for good cause shown relating to the individual applicant.

"(d) That all of its objects and purposes are lawful.

"(e) That it will not instigate, maintain, or support any strike for an illegal purpose.

"(f) That it will not investigate, maintain, or support any strike in violation of any collective-bargaining agreement, or in opposition to any arbitration award rendered pursuant to an agreement to submit to arbitration.

"(g) That it will not instigate, maintain, or support any strike to further any issue which the employer offers to submit to arbitration pursuant to section 12 hereof.

"(h) That it will not instigate, maintain, or support any strike, except as a last resort after making all reasonable efforts to settle the issues by direct negotiation and governmental mediation.

"(i) That it will agree to submit all jurisdictional disputes to arbitration pursuant to section 12 hereof, and will not engage in any jurisdictional strike, in cases where other organizations, parties to such dispute, likewise agree to submit to arbitration.

"(j) That it will not instigate, maintain, or support any strike designed or calculated to coerce government or any agency thereof either directly or by inflicting hardship upon the community, against any action on the part of the State or Federal Government, or any of the agencies, or political subdivisions thereof.

"(k) That it will not instigate, maintain, or support any strike except in furtherance of a trade dispute within the trade or industry in which the strikers are engaged.

"(l) That it will not coerce, or attempt to coerce, any worker to join any particular labor organization.

Mr. BURDICK. Mr. Chairman, a point of order. I make the point of order that the amendment is not germane to this section of the bill. It introduces the subject of strikes, and the bill is dealing with the subject of what are labor organizations.

Mr. LESINSKI. It looks like a bankers' bill.

Mr. RICH. Mr. Chairman, I wish to state that the amendment itself does its own speaking and it is not necessary for any Member of Congress to make any comment on it at this time.

The CHAIRMAN (Mr. ARNOLD). The Chair is inclined to think that the amendment is not subject to the point of order. The Chair therefore overrules the point of order.

S. Rep. No. 1184, 73d Cong. 2d Sess. 3 (1934)

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SENATE REPORT NO. 1184 ON S. 2926

not primarily a prosecuting agency to ferret out offenders. So far as possible all disputes will continue to be adjusted by conciliatory methods, such as those used in the Division of Conciliation of the Department of Labor. When a case cannot be adjusted because of the continuance of an unfair labor practice or because of disputes over representation, it can be referred to the Industrial Adjustment Board which can then judicially consider it. This makes two things plain: (1) The Board is to enforce the law as written by Congress; and (2) the Board acts only when enforcement is necessary and adjustment has failed.

ANALYSIS OF THE BILL

Section 1 is a self-explanatory declaration of policy.

Section 2 defines the terms used in the act. The most important of these definitions are those of "employer" and "employee." These words are so defined as to exclude from the operation of the act domestic servants, agricultural laborers, individuals employed by their parents or spouses, persons subject to the Railway Labor Act, and persons employing less than 10 employees. One of the important reasons for this exclusion is to make it clear that the Industrial Adjustment Board is to have jurisdiction over only those disputes which are of a certain magnitude and which affect commerce.

The definitions also make it clear that a person who has been discharged as a result of an employer's violation of this statute, if he has not obtained any other regular employment, may be considered by the Board as an employee. This does not mean that he will

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necessarily be so considered, but the Board may decide that he is entitled to be reinstated or to vote in a choice of representatives. Without this provision it is possible that an employer might contend that a worker he had unlawfully discharged had no remedy.

The reason for stating that "employer" excludes "any labor organization, other than when acting as an employer" is this: In one sense every labor organization is an employer, it hires clerks, secretaries, and the like. In its relations with its own employees, a labor organization ought to be treated as an employer, and the bill so provides. But in relation to other employees it ought not to be treated as an employer, and ought to have the right to use lawful means to induce employees to join the organization.

"Representatives" is defined in a manner to make it clear that it includes any organization or any individual. Without such a statement it could be contended that the workers could only choose one of their fellow workers as a representative.

93 Cong. Rec. 6599 (Senate, June 5, 1947)

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(8) Employees: Although the House bill changed the definition of "employees", the definition adopted in the conference report follows the language of the Senate amendment except in two minor respects. The subsection of the Senate bill has amended the language of the Wagner Act relating to the exemption for "agricultural laborers" to read "persons employed in agriculture" and the bill had later contained a definition of the term "agriculture" which was precisely the same as the definition in the Fair Labor Standards Act. The House bill, however, had defined this exception in much broader terms by incorporating in the bill certain language in the Internal Revenue Code which would have exempted employees engaging in the packing and processing of agricultural products prior to their delivery to a terminal market. The conferees ultimately decided not to have any definition of agriculture in either bill. Thus subsection (8) in this respect now is identical with the language in the present Wagner Act. The conferees also adopted language in the House bill excluding from the definition of "employees" individuals having status of independent contractors. While the Board itself has never claimed that independent contractors were employees, the Supreme Court has (the *Hearst Publications, Inc.*, 322 U. S. 111) held that the ordinary tests of the law of agency could be disregarded by the Board in determining if petty occupational groups were "employees" within the meaning of the Labor Relations Act. The Court consequently refused to consider the question whether certain categories of persons whom the Board had deemed to be "employees" might not, as a matter of law, have been independent contractors. The legal effect of the amendment therefore is merely to make it clear that the question whether or not a person is an employee is always a question of law, since the term is not meant to embrace persons outside that category under the general principles of the law of agency.

(9) Supervisors: Both the House bill and the Senate amendment excluded supervisors from the individuals deemed to be employees for the purposes of the act. There was a sharp divergence between the House and Senate, however, with respect to the occupational groups which fell within this definition. The Senate amendment, which the conference ultimately adopted, is limited to bona fide supervisors. The House, had included numerous other classes. There were generally (A) certain personnel who fix the amount of wages earned by other employees, such as inspectors, checkers, weighmasters, and time-study personnel (B) labor relations personnel, police, and claims personnel, and (C) confidential employees. The Senate amendment confined the definition of supervisor to individuals generally regarded as foremen and employees of like or higher rank.

In the case of persons working in labor relations personnel and employment divisions, it was not thought necessary to make specific provision, as was done in the House bill, since the Board had treated, and pre-

sumably will continue to treat, such persons as outside the scope of the act. This is the prevailing Board practice with respect to confidential secretaries as well, and it was not the intention of the conferees to alter this practice in any respect. The conference agreement does not treat time-study personnel or guards as supervisors, as did the House bill. Since, however, most time-study employees are professional personnel, the special provisions of the Senate amendment applicable with respect to professional employees will cover this category. In the case of guards, the conference agreement does not permit the certification of a labor organization as the bargaining representative of guards if it admits to membership, or is affiliated with any organization that admits to membership, employees other than guards. The provision dealing with the certification of bargaining units for guards is dealt with in section 9 (b) of the conference agreement, and the individuals who are to be considered as guards are described.

(9) Professional employees: The House bill did not contain any definition of the term "professional employees," although section 9 (f) (3) thereof recognized the principle embodied in section 9 (b) of the Senate amendment by permitting professional personnel to have voting units of their own in representation cases. The House agreed to the Senate language defining the term "professional employees."

(10) Agent: In the definition section of the conference agreement there is set forth a rule to be applied for the purpose of determining when a person is acting as an agent or another person, so as to make such other person responsible for his acts. A provision having the same effect was contained in section 12 of the House bill, under which the Norris-LaGuardia Act was made inapplicable in connection with certain activities dealt with in that section. Section 6 of the Norris-LaGuardia Act provides that no employer or labor organization participating or interested in a labor dispute shall be held responsible for the unlawful acts of its agents except upon clear proof of actual authorization of the particular acts performed, or subsequent ratification thereof after knowledge. (*Cf. United Brotherhood of Carpenters v. United States* — U. S. —; March 10, 1947). Under the conference agreement, as under the House bill, both employers and labor organizations will be responsible for the acts of their agents in accordance with the common law rules of agency and the ordinary evidence required to establish such relationship.

National Labor Relations Board

One of the major problems with which the conferees were faced with was the reconciliation of the provisions of the House bill and the Senate amendments with respect to the reorganization of the National Labor Relations Board. Under the Senate amendment the present Board members were to be retained in office but four additional members were to be added, thus increasing the Board

H. Rep. No. 245, 80th Cong. 1st Sess. 18 (1947)

[18]

HOUSE REPORT NO. 245 ON H. R. 3020

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case of fruits and vegetables, as an incident to the preparation of such fruits or vegetables for market. The provisions of this paragraph shall not be deemed to be applicable with respect to service performed in connection with commercial canning or commercial freezing or in connection with any agricultural or horticultural commodity after its delivery to a terminal market for distribution for consumption.

As used in this subsection, the term "farm" includes stock, dairy, poultry, fruit, fur-bearing animal, and truck farms, plantations, ranches, nurseries, ranges, greenhouses or other similar structures used primarily for the raising of agricultural or horticultural commodities, and orchards.

(D) An "employee", according to all standard dictionaries, according to the law as the courts have stated it, and according to the understanding of almost everyone, with the exception of members of the National Labor Relations Board, means someone who works for another for hire. But in the case of *National Labor Relations Board v. Hearst Publications, Inc.* (322 U. S. 111 (1944)), the Board expanded the definition of the term "employee" beyond anything that it ever had included before, and the Supreme Court, relying upon the theoretic "expertness" of the Board, upheld the Board. In this case the Board held independent merchants who bought newspapers from the publisher and hired people to sell them to be "employees". The people the merchants hired to sell the papers were "employees" of the merchants, but holding the merchants to be "employees" of the publisher of the papers was most far reaching. It must be presumed that when Congress passed the Labor Act, it intended words it used to have the meanings that they had when Congress passed the act, not new meanings that, 9 years later, the Labor Board might think up. In the law, there always has been a difference, and a big difference, between "employees" and "independent contractors". "Employees" work for wages or salaries under direct supervision. "Independent contractors" undertake to do a job for a price, decide how the work will be done, usually hire others to do the work, and depend for their income not upon wages, but upon the difference between what they pay for goods, materials, and labor and what they receive for the end result, that is, upon profits. It is inconceivable that Congress, when it passed the act, authorized the Board to give to every word in the act whatever meaning it wished. On the contrary, Congress intended then, and it intends now, that the Board give to words not far-fetched meanings but ordinary meanings. To correct what the Board has done, and what the Supreme Court, putting misplaced reliance upon the Board's expertness, has approved, the bill excludes "independent contractors" from the definition of "employee".

The definitions appearing in section 2 of the present act of the terms "representative" (4), "labor organization" (5), "commerce" (6), "affecting commerce" (7), and "unfair labor practice" (8) remain unchanged, although, in section 8, the "unfair labor practices" themselves are changed substantially.

Section 2 (9) of the present act, which defines "labor dispute", is omitted. The term does not appear anywhere in the present act except in the definitions. It does appear in the bill, but its meaning is clear from the context and from the bill as a whole and does not need defining. In any event, the old definition would be inappropriate in the amended act because, as the Labor Board has construed the act, a "labor dispute" exists whenever a union disagrees with an

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CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the Board's reply brief in the above-captioned case were served by first class mail, postage prepaid, this 5th day of July 1977, upon counsel for each of the defendants-appellees as follows:

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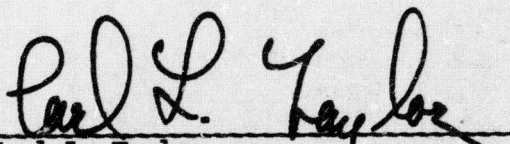
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